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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

EDWARD WIEDEMEIER,

Plaintiff and Appellant,

v.

AWS CONVERGENCE  
TECHNOLOGIES, INC.,

Defendant and Respondent.

B207779

(Los Angeles County  
Super. Ct. No. BC367473)

APPEAL from a judgment of the Superior Court of Los Angeles County, John P. Shook, Judge. Reversed.

Taylor & Ring, David M. Ring and Louanne Masry for Plaintiff and Appellant.

Horvitz & Levy, David M. Axelrad, Julie L. Woods; Bragg & Kuluva and Jill F. Teitelbaum for Defendant and Respondent.

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Plaintiff Edward Wiedemeier appeals from judgment on defendant's motion for summary judgment. He argues there are triable issues of material fact precluding summary judgment. We agree and reverse the judgment.

### **FACTUAL AND PROCEDURAL SUMMARY**

Defendant operates and maintains WeatherBug, a weather network of live, local stations which delivers weather conditions to millions of consumers. The material generated also is sent to nearly 100 television stations, as well as numerous federal, state, and local agencies (including the National Weather Service), via the Internet and mobile devices. Plaintiff, a gay man, was hired in March 2003 to sell Web site advertising space for defendant.

In recognition of a national sales award he had received, plaintiff was given a trip from March 3 to March 5, 2006 to defendant's national sales meeting in Florida. He was permitted to bring a guest. Plaintiff told Michael Rosen, senior vice president of advertising sales and marketing for defendant, that he would be bringing a male friend who would share his room. After this trip, plaintiff's former supervisor, Eric Greene, was replaced by Richard Johnson.<sup>1</sup> Johnson was based in San Francisco while plaintiff was based in Southern California, so the two met in person only two or three times. On July 21, 2006, Johnson telephoned plaintiff and informed him that he was terminated, effective immediately. When plaintiff asked why, Johnson said, "We think there are better types to call on blue chip advertisers." According to plaintiff, this was the only reason for the termination given by Johnson.

Plaintiff sued Johnson and defendant for wrongful termination in violation of public policy; discrimination based on sexual orientation discrimination based on medical

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<sup>1</sup> Plaintiff declared that Johnson began working with defendant's West Coast sales team on or about June 19, 2006. Johnson declared that he was hired on May 15, 2006.

condition; and sexual harassment.<sup>2</sup> Defendant moved for summary judgment, or in the alternative, summary adjudication, presenting evidence plaintiff was terminated for legitimate nondiscriminatory reasons because defendant was dissatisfied with his work. Plaintiff responded with evidence that his performance had been lauded by defendant until the trip to Florida and that he had received excellent job evaluations and repeated raises. In addition, plaintiff presented evidence of two statements made by Johnson at company events which plaintiff argued demonstrated bias against him because he is gay. Plaintiff did not oppose summary adjudication on his third cause of action for discrimination based on medical condition or on his fourth cause of action for sexual harassment.

The trial court granted summary adjudication on the cause of action for discrimination, finding that plaintiff failed to raise a triable issue of material fact as to pretext. Based on that conclusion, the court granted summary adjudication on plaintiff's cause of action for wrongful termination. Since the order resolved all of the remaining causes of action, judgment was entered for defendants. This timely appeal followed.

## **DISCUSSION**

### **I**

We first address challenges to the trial court's rulings on evidentiary objections to the evidence submitted on the summary judgment motion. Evidentiary rulings in the context of a summary judgment motion are reviewed for abuse of discretion. (*Landale-Cameron Court, Inc. v. Ahonen* (2007) 155 Cal.App.4th 1401, 1407.)

#### ***A. Objections to Plaintiff's Evidence***

Plaintiff argues the trial court abused its discretion in sustaining defense objections to certain exhibits he proffered in opposition to the summary judgment motion. Although plaintiff's declaration stated that the challenged exhibits were attached to his declaration,

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<sup>2</sup> Plaintiff is not appealing from the judgment in favor of defendant Richard Johnson.

they were instead attached to the declaration of plaintiff's attorney, Louanne Masry. Defendant objected that plaintiff failed to attach exhibits 1-5 to his declaration. Defendant also objected to exhibits 1 through 5 and 11 for lack of foundation, personal knowledge and authentication.<sup>3</sup> The trial court sustained the defense objections to these exhibits without indicating the grounds for the ruling. We reject as hypertechnical the objection that the exhibits were not attached as indicated to plaintiff's declaration, but were instead attached to his attorney's declaration.

We agree with the trial court that plaintiff's attorney failed to provide authentication or foundation for the challenged exhibits. She merely declared that true and correct copies of the exhibits were attached to her declaration. Plaintiff provided more detailed information about the exhibits in his declaration, which demonstrates that the exhibits were generated by employees of defendant and received by him.

The declaration is not sufficient to establish the authenticity of their contents, but this is not material because, with the exception of exhibit 11, plaintiff's declaration sets out the gist of the exhibits as a matter of his own personal knowledge. "Declarations in support of or opposition to a motion for summary judgment or adjudication 'shall be made by any person *on personal knowledge*, shall set forth admissible evidence, and *shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations.*' (Code Civ. Proc., § 437c, subd. (d), italics added.)" (*Lopez v. University Partners* (1997) 54 Cal.App.4th 1117, 1124.) We therefore rely on plaintiff's declaration rather than the supporting exhibits.

### ***B. Objections to Defendant's Evidence***

Defendant argues the trial court erred in sustaining plaintiff's objections to e-mail exhibits attached to Michael Rosen's declaration. The trial court did not state the basis

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<sup>3</sup> The declaration by plaintiff's attorney stated that true and correct copies of exhibits 1 through 12 were attached, without any other foundation or authenticating information. Defense objections to her declaration, on the same grounds as the objections to plaintiff's declaration, were sustained to exhibits 1 through 5 and 11.

for the ruling.<sup>4</sup> Defendant argues the e-mails were not hearsay because they were offered for Rosen's state of mind (perception of plaintiff's behavior) rather than the truth of the matter asserted. We have examined the challenged exhibits and reject defendant's argument that the exhibits were submitted only for Rosen's state of mind. The e-mail strings (this term refers to an email message and the series of replies) detail the basis for Rosen's dissatisfaction with plaintiff and were thus submitted for the truth of the matter asserted. Defendant confirms this conclusion by arguing "the email strings were relevant to show the reasons why Wiedemeier was terminated. The evidence showed that when Rosen hired Johnson, he informed Johnson of Wiedemeier's problems (as demonstrated in the emails). In deciding to terminate Wiedemeier, Johnson took into account Rosen's report. . . . Accordingly, the email strings are relevant and are not more prejudicial than probative."

Alternatively, defendant claims there was adequate foundation and authentication for the e-mails because Rosen was a participating author of some, was copied on others, testified as to the circumstances surrounding the documents, and verified that they were true and correct copies. The same showing was made as to the e-mails submitted by plaintiff to which defendant successfully objected.<sup>5</sup>

We find no abuse of discretion in the exclusion of the Rosen declaration exhibits. We will consider his description of those exhibits in his declaration.

## II

FEHA makes it an unlawful employment practice for an employer "*because of* race, religious creed, color, national origin, ancestry, physical disability, mental

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<sup>4</sup> Plaintiff objected to the exhibits on the grounds of hearsay, lack of foundation, relevance, Evidence Code section 352 and lack of authentication. The reporter's transcript does not reflect rulings on plaintiff's objections 15-24 to the Rosen declaration. The trial court's written order states that these objections were overruled.

<sup>5</sup> Although plaintiff did not declare that each of the exhibits was a true and correct copy of the e-mail he was describing, his attorney provided that information in her declaration.

disability, medical condition, marital status, sex, age, *or sexual orientation* . . . to discharge the person from employment . . . .” (Gov. Code, § 12940, subd. (a), italics added.) This language is similar to language of title VII (42 U.S.C. § 2000e-2(a)) which makes it an unlawful employment practice for an employer: “(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual’s race, color, religion, sex, or national origin; . . .” (Italics added.)

California courts look to pertinent federal precedent when applying the California statute because of the similarity between state and federal employment discrimination laws. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*).) *Guz* cited *Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306. The *Mixon* court observed: “While the California [antidiscrimination act] and title VII differ in some particulars, their objectives are identical, and California courts have relied upon federal law to interpret analogous provisions of the state statute. [Citations.]” (*Mixon*, at p. 1316; see also *Hall v. County of Los Angeles* (2007) 148 Cal.App.4th 318, 326, fn. 6 [“Because FEHA has a federal counterpart (title VII of the federal Civil Rights Act of 1965, 42 U.S.C. § 2000e et seq.) and the antidiscrimination objectives and public policy purpose of the two laws are the same, California’s courts routinely rely on federal decisions to interpret analogous parts of FEHA.”].)

At oral argument, we invited counsel to brief the applicability of the United States Supreme Court’s recent decision in *Gross v. FBL Financial Services, Inc.* (2009) \_\_ U.S. \_\_ [129 S.Ct. 2343] (*Gross*). *Gross* is a so-called “mixed-motive” case under the Age Discrimination in Employment Act (ADEA, 29 U.S.C. § 623(a)). In such cases, “the employment decision at issue would have resulted from a mixture of illegitimate and legitimate considerations.” (*Huffman v. Interstate Brands Corp.* (2004) 121 Cal.App.4th 679, 702.) The analytical framework for mixed-motive cases under title VII was established by the Supreme Court in *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 232 (*Price Waterhouse*).

The *Gross* court held that title VII and the cases construing it, like *Price Waterhouse*, were not controlling because the language of the ADEA is significantly different from title VII. It examined the plurality determination in *Price Waterhouse* that if an employee's membership in a protected class played a motivating part in the employment decision, the defendant could avoid liability only by proving it would have made the same decision even if that factor had not been taken into account. (*Gross, supra*, 129 S.Ct. at p. 2349.) A 1991 amendment to title VII "explicitly authorize[ed] discrimination claims in which an improper consideration was 'a motivating factor' for an adverse employment decision. See 42 U.S.C. § 2000e-2(m)." (*Ibid.*) The *Gross* court relied on the failure of Congress to make a parallel amendment to the ADEA. (*Ibid.*)

Since the ADEA requires a plaintiff to demonstrate discrimination "because of" age, the Supreme Court concluded: "To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age *was the 'but-for' cause of the employer's adverse decision.*" (*Gross, supra*, 129 S.Ct. at p. 2350, italics added.) It applied the same standard to the mixed-motive situation. (*Id.* at p. 2352.)

Plaintiff argues that *Gross* has no application to his claim, arguing that it is limited to the statutory language and history of the ADEA. He contends that historically, FEHA has been liberally construed, citing *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 280, in which the Supreme Court held that to plead a cause of action for hostile environment sexual harassment, "it is "only necessary to show that gender is a substantial factor in the discrimination, and that if the plaintiff 'had been a man she would not have been treated in the same manner.'" [Citations.]"

As may be expected, defendant argues that we should apply *Gross* to preclude plaintiff from alleging a mixed-motive discrimination claim. It points out that plaintiff raised only a FEHA claim here, and therefore the mixed-motive language in title VII is irrelevant. Defendant also relies on the fact that FEHA has not been amended to expressly allow mixed-motive cases as was title VII. Instead, FEHA uses the "because of" language which also appears in the ADEA and was the basis for the *Gross* decision.

We conclude that *Gross* does not apply to our case because here no mixed-motive claim or defense is raised. In its answer to the complaint, defendant raised numerous affirmative defenses, but did not assert that the decision to discharge plaintiff was the product of both legitimate and discriminatory reasons. Instead, it asserted there were legitimate, nondiscriminatory reasons for plaintiff's discharge. (Answer, [¶][¶]16, 17)

In *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95 (*Reeves*), a retaliation case under FEHA, the court examined the appropriate analytical framework, noting that the parties had accepted the applicability of the three-step analysis adopted by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-804. Under that analysis, which we examine in more detail below, an employer presents evidence that an adverse employment action was taken for a legitimate, nondiscriminatory reason. The plaintiff then bears the burden to rebut that showing by presenting evidence that raises a rational inference that intentional discrimination occurred. (*Guz, supra*, 24 Cal.4th at p. 357.) The court in *Reeves* noted: "Plaintiff has not invoked *the competing model* of "'mixed motive'" analysis, under which a case goes to the jury if there is evidence that an impermissible criterion "'was a motivating factor for any employment practice.'" [Citations.]" (*Reeves, supra*, 121 Cal.App.4th at p. 111, fn. 11, italics added.)

In *Huffman v. Interstate Brands Corp., supra*, 121 Cal.App.4th 679, an age discrimination case under FEHA, the plaintiff argued that the defendant employer had the burden of proving its reasons for terminating him because his was a mixed-motive case. The court rejected this argument because the case had been pled and tried as a pretext case, not a mixed-motive case. It noted that the defendant had never raised mixed-motive as an affirmative defense, and never presented that theory to the jury. Instead, the defendant had argued that it had legitimate nondiscriminatory reasons for discharging the plaintiff. Plaintiff had argued that the employer's stated reasons for terminating him were pretextual. (*Id.* at p. 702.)

Here, defendant argues that the *McDonnell Douglas* test applies. Plaintiff also relies on this analytical framework. The focus of briefing was whether the legitimate

nondiscriminatory reasons proffered by defendant as the basis for plaintiff's termination were pretextual, and whether plaintiff submitted evidence raising a triable issue of material fact as to whether his termination was because of discrimination because of his sexual orientation. As in *Reeves, supra*, 121 Cal.App.4th 95 and *Huffman, supra*, 121 Cal.App.4th 679, this is not a mixed-motive case. The analysis of the court in *Gross*, which applies to a mixed-motive case, is not applicable.<sup>6</sup>

### III

Plaintiff's claim is for discriminatory disparate treatment based on his sexual orientation.<sup>7</sup> Discrimination cases may be proven "in either of two ways: by direct or by circumstantial evidence." (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 549, citing *Guz, supra*, 24 Cal.4th at p. 354.) Where the plaintiff relies on circumstantial evidence, California has adopted the three-stage burden-shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green, supra*, 411 U.S. 792 for trying claims of discrimination based on a theory of disparate treatment. (*Ibid.*) But the *McDonnell Douglas* test does not apply where plaintiff presents direct evidence of discrimination. (*DeJung v. Superior Court, supra*, 169 Cal.App.4th at p. 550, citing *Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1144 (*Trop*).) We first address plaintiff's direct evidence.

As direct evidence of discrimination, plaintiff submitted his declaration demonstrating what he characterized as anti-gay comments by Johnson. On June 21, 2006, plaintiff and other employees of AWS were in San Francisco for a sales meeting. A dinner was held which was attended by plaintiff, Johnson, Chris Backschies (another sales person for defendant), and others. Plaintiff said: "During the dinner, Chris Backschies was talking about his children and said that they liked to watch a television

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<sup>6</sup> In any event, as we discuss in part IV of our discussion, California courts apply the "but for" test of causation in FEHA cases. (*Reeves, supra*, 121 Cal.App.4th at p. 108.)

<sup>7</sup> "Disparate treatment' is *intentional* discrimination against one or more persons on prohibited grounds." (*Guz, supra*, 24 Cal.4th 354, fn. 20.)

show called ‘The Wiggles.’ At that point, Johnson made a comment stating, in essence, ‘Oh, they are just a bunch of gay men running around in purple tights.’” Defendant submitted plaintiff’s deposition testimony about this incident in which he described the same comment made by Johnson and continued: “And having been the weekend that there is a gay pride parade in town in San Francisco, and someone asked me, ‘Hey Ed, what’s that all about, the gay pride parade?’ To tip off, ‘Hey Richard, Ed’s gay.’”

The other allegedly anti-gay comment cited by plaintiff was also described both in plaintiff’s declaration and in the excerpts of plaintiff’s deposition submitted by defendant. The descriptions are very similar. In his declaration, plaintiff said he, Eric Lieb and Johnson attended an industry mixer in Los Angeles on July 12, 2006. At one point, he observed Johnson speaking to a man named Sunil, whom he recognized as being with the Carat Agency, a potential client. While Johnson and Sunil were talking, plaintiff approached them and said, “‘Oh, have you guys met?—do you guys know each other?’” Johnson immediately responded and said “‘No, we just met each other—we both like titties—something you wouldn’t know much about.’” In deposition, plaintiff testified he was floored and embarrassed, and laughed it off, saying, “‘Okay. Are we going to go out to dinner or do something after this event?’” Johnson said, “‘No, you can leave.’” Plaintiff testified that he was “‘pretty shocked” by Johnson’s remarks.

We view the evidence in the light most favorable to plaintiff, as the nonmoving party, liberally construing his evidence while strictly scrutinizing defendant’s evidence. (*Kelly v. Stamps.com Inc.* (2005) 135 Cal.App.4th 1088, 1097-1098 (*Kelly*).) Plaintiff argues that the anti-gay bias indicated in these comments is confirmed by Johnson’s explanation that he was terminating plaintiff because “‘We think there are better types to call on blue chip advertisers.’”

Defendant argues that the two comments by Johnson do not constitute direct evidence of discriminatory intent because they were not contemporaneous with plaintiff’s discharge. It relies on *Trop v. Sony Pictures Entertainment, Inc.*, *supra*, 129 Cal.App.4th 1133, in which an employee claiming pregnancy discrimination cited various comments by her employer, made before and after her employment was terminated, as evidence of

discrimination based on her pregnancy. In concluding that the comments did not constitute direct evidence, the *Trop* court cited *Kennedy v. Schoenberg, Fisher & Newman, Ltd.* (7th Cir. 1998) 140 F.3d 716, which held that in order to rise to the level of direct evidence of discrimination, “‘isolated comments must be contemporaneous with the discharge or causally related to the discharge decision making process.’ [Citation.]” (*Id.* at p. 723.) In *Kennedy*, one comment (that if plaintiff were his wife, the employer would not want her working after having children) was made five months before the termination and was found “not temporally related to her discharge.” (*Id.* at p. 724.) The *Kennedy* court also found no causal nexus between the remark and the termination because it occurred in a casual setting unrelated to discussions about the issues which led to the termination. (*Ibid.*)

In *Trop*, at an office Christmas party, the pregnant plaintiff played with the infant of another employee. She remarked: “‘It looks like I get to have one of my own.’” (*Trop, supra*, 129 Cal.App.4th at p. 1140.) Her employer responded: “‘Not while you are working for me.’” (*Ibid.*) Based on *Kennedy*, the court concluded that the employer’s remark was not direct evidence of discrimination. The statement was made more than one month before the employment termination, in a Christmas party conversation unrelated to plaintiff’s performance. The court found no causal relationship between the statement and the termination. (*Trop v. Sony Pictures Entertainment, Inc., supra*, 129 Cal.App.4th 1148-1149.)

Plaintiff was fired on July 21, 2006. Johnson’s comment about gay men in purple tights was made one month before, at a dinner during a sales meeting. The comment that plaintiff does not know much about liking “titties” was made on July 12, 2006 during a cocktail mixer for advertisers. “Direct evidence is evidence which proves a fact without inference or presumption.” (*Trop v. Sony Pictures Entertainment, Inc., supra*, 129 Cal.App.4th at p. 1145.) Under the principles discussed in *Trop*, we conclude that Johnson’s comments, however inappropriate, were neither contemporaneous nor causally related to plaintiff’s termination.

Plaintiff also claims Johnson’s statement that plaintiff was terminated because there are “better types” to make the sales defendant sought, was direct evidence of discrimination. While contemporaneous with the termination, this statement is not direct evidence because it requires an inference that the phrase refers to sexual orientation.

Our conclusion that these remarks fall short of direct evidence is not necessarily fatal to plaintiff’s case. All three comments may be considered circumstantial evidence that plaintiff was terminated because of a discriminatory intent.

#### IV

As we have discussed, where a plaintiff’s employment discrimination case is based on circumstantial evidence, we apply the *McDonnell Douglas* three part test: ““(1) The complainant must establish a prima facie case of discrimination; (2) the employer must offer a legitimate reason for his actions; (3) the complainant must prove that this reason was a pretext to mask an illegal motive.” [Citation.]’ [Citations.]” (*DeJung v. Superior Court, supra*, 169 Cal.App.4th at p. 552, quoting *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68.)

““This so-called *McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained.’ (*Guz, supra*, 24 Cal.4th at p. 354.)” (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1004.)

There is some question about how the *McDonnell Douglas* test should be applied in the context of a motion for summary judgment by a defendant. The Supreme Court discussed the issue in *Guz, supra*, 24 Cal.4th at page 356, observing that some courts have “suggested that because a plaintiff opposing summary judgment need not demonstrate triable issues until the moving defendant has made an initial no-merit ‘show[ing],’ the *McDonnell Douglas* burdens are ‘reversed’ on a defense motion for summary judgment against a claim of discrimination in employment.” It noted that other California cases had “indicated that the plaintiff can survive an employer’s motion for

summary judgment only by presenting, at the outset, triable evidence satisfying the prima facie elements of *McDonnell Douglas*. [Citations.]” (*Id.* at p. 357.) The Supreme Court declined to resolve the issue because the defendant in that case did not rely only on an argument that the plaintiff failed to demonstrate a prima facie case of age discrimination. Instead, the defendant submitted admissible evidence of its legitimate nondiscriminatory reasons for eliminating the plaintiff’s work unit. The Supreme Court found that since the defendant’s explanation was “credible on its face,” plaintiff had a burden “to *rebut* this facially dispositive showing by pointing to evidence which nonetheless raises a rational inference that intentional discrimination occurred.” (*Ibid.*)

A year after *Guz* was decided, the Supreme Court clarified the burdens on summary judgment in this context in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826 (*Aguilar*). The analysis was explained by the court in *Scotch, supra*, 173 Cal.App.4th at p. 1005: “In *Kelly, supra*, 135 Cal.App.4th 1088, the court explained the *Guz* standard in light of the California Supreme Court’s decision in *Aguilar*[, *supra*,] 25 Cal.4th 826: ‘A defendant employer’s motion for summary judgment slightly modifies the order of these [*McDonnell Douglas*] showings. If, as here, the motion for summary judgment relies in whole or in part on a showing of nondiscriminatory reasons for the discharge, the employer satisfies its burden as moving party if it presents evidence of such nondiscriminatory reasons that would permit a trier of fact to find, more likely than not, that they were the basis for the termination. (See [*Aguilar, supra*,] 25 Cal.4th [at pp.] 850-851 . . . ; cf. *Guz, supra*, 24 Cal.4th at p. 357.) To defeat the motion, the employee then must adduce or point to evidence raising a triable issue, that would permit a trier of fact to find by a preponderance that intentional discrimination occurred. (*Aguilar*, at pp. 850-851; *Guz*, at p. 357.) In determining whether these burdens were met, we must view the evidence in the light most favorable to plaintiff, as the nonmoving party, liberally construing her evidence while strictly scrutinizing defendants.’” (*Kelly, supra*, 135 Cal.App.4th at pp. 1097-1098.) We agree with this formulation and apply it below. (*Scotch, supra*, 173 Cal.App.4th at p. 1005.)

Here, defendants submitted evidence of nondiscriminatory reasons for discharging plaintiff in support of their motion for summary judgment. In these circumstances, we apply the framework described in *Kelly, supra*, 135 Cal.App.4th 1088. We review the trial court's decision de novo. (*Id.* at p. 1097.)

#### IV

On appeal, plaintiff confines his arguments to summary adjudication of his causes of action for sexual orientation discrimination and wrongful termination in violation of public policy. The cause of action for wrongful termination is derivative of the discrimination cause of action, alleging a violation of the public policy against discrimination based on sexual orientation as the basis for his termination. Therefore, if plaintiff raised a triable issue of material fact as to the cause of action for sexual orientation discrimination, he also raised one as to the wrongful termination claim.

A necessary element under FEHA is “a ‘causal link between [a plaintiff's] protected activity and the employer's action. [Citations.]’” (*Reeves, supra*, 121 Cal.App.4th at p. 107, quoting *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476.) As the *Reeves* court observed, “After all, FEHA prohibits adverse treatment ‘because of’ protected activities. [Citation.]” (*Ibid.*)

The *Reeves* court framed the issue as whether retaliatory animus was a “but-for cause” of the employer's adverse action, citing *Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 665, footnote 6. (*Reeves, supra*, 121 Cal.App.4th at p. 108.) The quoted passage in *Clark* relies on *McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 282, footnote 10. In *McDonald*, a race discrimination action under title VII, the United States Supreme Court relied on *McDonnell Douglas, supra*, 411 U.S. at page 804 in which it held that title VII does not permit an employer to use an employee's conduct as a pretext for discrimination prohibited by the act. The *McDonald* court explained: “The use of the term ‘pretext’ in this context does not mean, of course, that the Title VII plaintiff must show that he would have in any event been rejected or discharged *solely on the basis of his race*, without regard to the alleged deficiencies; as

[*McDonnell Douglas*] makes clear, no more is required to be shown than that race was a ‘but for’ cause. [Citation.]” (*McDonald, supra*, 427 U.S. at p. 282, fn. 10, italics added.)

*Reeves* held that the element of causation under FEHA may be satisfied “by showing that *any* of the persons involved in bringing about the adverse action held the requisite animus, provided that such person’s animus operated as a ‘but-for’ cause, i.e. a force without which the adverse action would not have happened. *Certainly a defendant does not conclusively negate the element of causation by showing only that some responsible actors, but not all, were ignorant of the occasion for retaliation.*” (*Reeves, supra*, 121 Cal.App.4th at p. 108, italics added.) After a review of pertinent cases, the court concluded: “[I]gnorance of a worker’s protected activities or status does not afford a categorical defense unless it extends to *all* corporate actors who contributed materially to an adverse employment decision.” (*Id.* at p. 109.) In *Reeves*, a district manager for the employer terminated the plaintiff in reliance on a report prepared by a security officer employed by the company. The appellate court held that the district manager’s ignorance that the plaintiff (a man) had complained about sexual harassment of female employees, did not negate the element of causation because it did not show that others involved in the decision to terminate the plaintiff acted for legitimate nondiscriminatory motives. (*Id.* at p. 113.)

Under *Reeves, supra*, 121 Cal.App.4th at page 108, it is not enough for defendant to rely, as it does, on evidence that Rosen was unaware that plaintiff is gay. Since Johnson admitted that he knew plaintiff was gay, his role as the person who directly terminated plaintiff is critical to our analysis as we next discuss.

## V

Defendant submitted evidence of nondiscriminatory reasons for plaintiff’s discharge. As we have seen, its burden as moving party is satisfied if it presents evidence that would permit a trier of fact to find, more likely than not, that the nondiscriminatory reasons were the basis for termination. (*Scotch, supra*, 173 Cal.App.4th at p. 1005.) We begin our analysis with that showing.

Defendant's theory was that plaintiff was terminated because his job performance was unsatisfactory. It cites evidence that the great majority of plaintiff's advertising sales were to Lower My Bills, a client that bought a high volume of low-rate advertising (space left available when the higher-rate, premium ads were not sold). According to declarations by Rosen, senior vice president of advertising sales and marketing for defendant, and Johnson, director of West Coast sales, defendant had given a mandate to the sales team to transition from low-rate bulk advertisers like Lower My Bills to higher-rate, big-brand advertisers. Neither Rosen nor Johnson said when this mandate was given to defendant's sales force, and there was no other evidence to establish that timeframe. In addition, when hired, Johnson was placed "under incredible pressure to get the West Coast region in order" because the region's sales were significantly below quota.

Rosen was Johnson's direct supervisor. When Johnson was hired, Rosen expressed "frustrations he was having with Plaintiff's performance, but left it up to [Johnson] whether or not to retain him." During his interview for the position, Johnson was asked: "[U]nder what conditions I might fire someone who was hitting their number/quota. I responded that termination would be warranted if the employee was not fulfilling other key areas of the job, such as bringing in new business." Johnson explained: "When I was hired, I was given the discretion to work with the existing sales team or replace them with new people as needed to get sales results."

Johnson declared: "Because Plaintiff was one of the higher paid employees, to justify that expense, I wanted to see that Plaintiff was going to help move the company toward[s] its overall strategic goal of transitioning from direct response/remnant advertisers and into brand ads (which were much more lucrative)." He explained: "Because Lower My Bills bought a high volume of low-rate advertising . . . Plaintiff was consistently one of the top commission-earners, but he was not selling to new clients, or bringing in the kind of brand advertising that AWS wanted." Johnson declared that "[i]t was my impression that Plaintiff was content with the income he generated from Lower My bills and that he was not highly motivated to bring in new big-brand accounts that AWS was seeking." He added: "Although I supervised Plaintiff for just a short time, my

impression was that Plaintiff complained a lot, and always blamed others for his inability to capture new accounts.”

According to Johnson, “[a]round July 2006” he attended a meeting with plaintiff and representatives of Lower My Bills with the goal of converting Lower My Bills from purchasing low-rate ads to purchasing some premium, high-rate ads. Johnson felt that plaintiff treated this as a social gathering and did not provide the “‘hard-sell’ that was required.” Johnson was so dissatisfied that he had to “take the lead in terms of getting the client on board with a more strategic solution.” At the end of the meeting, Johnson told plaintiff that he needed to increase new sales and convert current clients to premium ads, but plaintiff became defensive, which left Johnson with “a bad feeling.”

Johnson declared that he wanted to “see Plaintiff’s ability to: (1) convert Lower My Bills to higher-rate ads; (2) bring in new, big-brand advertisers; (3) expand his clients so as not to rely primarily on one account; (4) demonstrate drive and dedication; and (5) interact with his superiors in a positive, constructive, non-defensive way. These things, it appeared, he could not do; therefore, I decided to terminate him. I needed to bring in someone who could do the job I needed—a hard-hitting, hungry salesperson. In making the termination decision, I considered the things I had learned from Rosen about Plaintiff’s performance.”

Johnson also declared that he did not know plaintiff was HIV positive until plaintiff brought his lawsuit. In addition, Johnson said that he was very close to a gay relative, had used a gay nanny for his children, and that his wife’s best friend is a gay man.

Rosen declared that he grew increasingly frustrated with plaintiff’s performance, without indicating the applicable time period. He noted that plaintiff had inherited his major account, Lower My Bills, which he maintained and fostered. Much of Rosen’s dissatisfaction grew from what he considered to be unauthorized or inappropriate e-mails written by plaintiff. As we have discussed, the trial court sustained plaintiff’s objections to the admissibility of these e-mails, so we confine our discussion to Rosen’s description of the e-mails.

On January 18, 2006, Rosen and other colleagues were copied by plaintiff on what Rosen described as an “unintelligible” e-mail sent to a client. Plaintiff had written: “[T]he bird and the shark are being bad, can we get them fixed?” Rosen wrote to plaintiff’s supervisor: “‘What is Ed doing here ccing everyone on this very strange e-mail. Not good! Not good.’” Plaintiff’s supervisor (Johnson’s predecessor, Eric Greene) wrote Rosen: “‘Man o man. Is this guy bipolar? I’ll talk to him to see what the hell he is thinking.’”

Another string of e-mails Rosen received on February 15, 2006, also was a concern to Rosen. He described them as evidence that plaintiff had claimed that Rosen had approved a deal which had not been approved. On March 13, 2006, Rosen received an e-mail string which showed that plaintiff had promised to provide information that did not exist to a client. In response, defendant’s client services group manager wrote to Rosen: “‘FYI – I’m going to beat this fockers ass one day!’” The same day, Rosen received another e-mail string in which the client services group manager told plaintiff’s supervisor that he did not appreciate plaintiff’s lack of respect toward himself and his team and that it would not continue. The manager also wrote that plaintiff “‘definitely needs work and still doesn’t get that the crap he’s bringing in . . . isn’t really what we need.’” In the exchange, plaintiff’s supervisor (Eric Greene) wrote “‘a piece of work . . . Trust me’ and acknowledged that they both shared frustration with him.”

On March 21, 2006, Rosen was copied on an e-mail by plaintiff’s supervisor, Eric Greene, to plaintiff. Greene told plaintiff: “‘[T]he daily report you sent shows little activity and overall lack of concern.’” Rosen declared that he interpreted plaintiff’s response as defensive rather than constructive. Rosen received an e-mail string from March 23, 2006, which indicated that plaintiff had implemented a rate increase that the client had not agreed to, which held up a payment of \$100,000 when it was disputed. The e-mail indicated that it was a third request by someone in defendant’s company seeking an explanation.

Despite Rosen’s claimed dissatisfaction with plaintiff, there is no evidence, in Rosen’s declaration or elsewhere, that he spoke with plaintiff regarding these issues. He

did tell plaintiff by e-mail on May 12, 2006 to have more client ““meetings/dinners/lunches’ each week.” Rosen told Johnson about his frustrations with plaintiff but left it up to Johnson whether to retain him. On May 25, 2006, Rosen sent e-mails to plaintiff complaining that his sales revenue for that month had dropped by \$63,000, did not meet Rosen’s expectations, and that he should not rely on one account for business. Rosen listed the same goals and improvements he expected from plaintiff as those listed in Johnson’s declaration. He said that because it appeared that plaintiff “could not do these things, I supported Johnson’s decision to terminate him.” Like Johnson, Rosen declared that he did not know plaintiff was HIV positive until the lawsuit was filed.

We are satisfied that this evidence would permit a trier of fact to find, more likely than not, that the nondiscriminatory reasons involving dissatisfaction with plaintiff’s performance were the basis for his termination. (*Scotch, supra*, 173 Cal.App.4th at p. 1005.) This brings us to the next step in the analysis, whether plaintiff submitted evidence raising a triable issue that would permit a trier of fact to find by a preponderance that intentional discrimination occurred. (*Ibid.*)

## VI

In order to establish that the nondiscriminatory reasons given by an employer are pretextual, “[a]n employee must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the reasons offered by the employer for the employment decision that a reasonable trier of fact could rationally find the reasons not credible, and thereby infer the employer did not act for the stated nondiscriminatory purpose.” (*Scotch, supra*, 173 Cal.App.4th at p. 1007, citing *Morgan v. Regents of University of California, supra*, 88 Cal.App.4th at p. 75.) Circumstantial evidence of employment discrimination “typically relates to such factors as the plaintiff’s job performance, the timing of events, and how the plaintiff was treated in comparison to other workers.” (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1153.)

““[T]he plaintiff may establish pretext ‘either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing

that the employer's proffered explanation is unworthy of credence.” [Citation.]’ [Citations.]” (*DeJung, supra*, 169 Cal.App.4th at p. 553.) A plaintiff is required to produce ““““very little’ direct evidence of the employer’s discriminatory intent to move past summary judgment.” . . .” (*Ibid.*) As the court explained in *Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, “Because proof of discriminatory intent often depends on inferences rather than on direct evidence, very little evidence of such intent is necessary to defeat summary judgment. [Citations.]” (*Id.* at p. 991.)

Plaintiff’s circumstantial evidence of pretext falls into several categories.

***A. Plaintiff Was Outstanding Employee***

Plaintiff presented evidence through his declaration that he received raises for 2005 and 2006 (just three months before he was terminated). He also received repeated accolades for his performance. In January 2006, plaintiff was recognized with the first annual Platinum Club award for being defendant’s top national salesperson for the year 2005. At the award dinner in Florida in March 2006, Rosen congratulated plaintiff on the job he was doing and made a toast congratulating plaintiff and another salesperson for their accomplishments. Rosen testified at his deposition that he gave plaintiff raises including the raise in April 2006, writing in an e-mail that plaintiff’s performance was “amazing” and recognizing his hard work. Bob Marshall, president and CEO of defendant, sent plaintiff an e-mail on April 6, 2006 thanking him for his contributions to defendant.

Rosen testified at his deposition that revenue was the most important factor to the defendant. In 2004, the first full year plaintiff worked for defendant, he was the top national salesperson, having earned revenue of \$2,880,000 for the company. Between January and July 2006, plaintiff earned approximately \$1.2 million in revenue. Between January 2004 and July 2006, he brought in revenue of \$7.3 million and no other salesperson earned that much revenue in that time period. In his declaration, plaintiff claims that defendant’s calculation that 82 percent of his revenue in 2005-2006 came from Lower My Bills is incorrect, but fails to explain that assertion or to demonstrate the

correct figure. He therefore fails to raise a triable issue of material fact as to whether that account was the source of most of the revenue plaintiff generated, a criticism raised by defendant.

This evidence of plaintiff's raises, accolades, and revenue generation is sufficient to raise a triable issue of material fact disputing defendant's claim that plaintiff was terminated because of dissatisfaction with his performance. Defendant dismisses this evidence as demonstrating that plaintiff performed well in the past, but did not show present satisfactory performance. Given the very short time frame between the award, the raise, and accolades that plaintiff received in March and April of 2006 and his termination in July 2006, we conclude plaintiff's evidence raises a triable issue of material fact.

In *DeJung, supra*, 169 Cal.App.4th 533, the court reversed summary judgment for the employer in an age discrimination case brought by a candidate for a position as superior court commissioner. The plaintiff previously had served as a full-time commissioner for 14 years, then split a commissioner position with another person for approximately eight years. When the court decided to make the part-time position full time, the plaintiff applied. He was not ranked among the top four candidates and was passed over for a younger, less experienced candidate. The *DeJung* court ruled: "The trier of fact would also be entitled to consider that in all of [plaintiff's] years of service as a commissioner, only two complaints about his performance had been received, both of which originated with disgruntled litigants. This evidence would entitle a reasonable trier of fact to infer that by any objective standard, [plaintiff's] background and experience should have placed him among the top candidates for the position." (*Id.* at p. 554.) In addition, the court noted that the top three candidates were older than the fourth ranked candidate who was chosen for the position. The court concluded that this evidence supported an inference of pretext precluding summary judgment. (*Ibid.*)

As in *DeJung*, plaintiff's record of high revenue production and repeated accolades from management is evidence which raises a triable issue of material fact as to whether the reasons asserted by defendant were pretextual.

### ***B. Discriminatory Remarks***

We have discussed the two remarks made by Johnson which plaintiff asserts demonstrate hostility toward gays, and in particular, toward him as a gay man. Johnson testified that he received no training from defendant on sexual discrimination or sexual harassment. While not direct evidence of discriminatory intent, these remarks, particularly the second, are sufficient to raise a triable issue of material fact as to whether Johnson was biased against gays. In light of these comments, it may be inferred that the stated reason Johnson gave for plaintiff's termination, that there are "better types" to sell to the accounts defendant sought, is an indication that Johnson did not want a gay person on the sales team. The ambiguity of this phrase, in the context of the anti-gay remarks made by Johnson, raises a triable issue of material fact as to discriminatory intent.

In *DeJung, supra*, 169 Cal.App.4th 533, a judge involved in the selection of commissioners made statements that the court wanted someone younger, maybe in their 40's. The plaintiff was 64 years old, the chosen candidate was 43. The Court of Appeal held that this evidence was sufficient to raise a triable issue of material fact on the issue of pretext. (*Id.* at p. 554.)

### ***C. Timing***

Plaintiff argues the timing of his termination, within four months after the Florida trip, raises an inference that defendant harbored a discriminatory intent. Johnson was told by another employee of defendant that plaintiff was gay, and that he had shared his room in Florida with a male friend. Rosen was aware that plaintiff shared his room with a male friend in Florida, but denied knowing plaintiff was gay until the litigation began.

As we have discussed, plaintiff presented evidence that his performance before the Florida trip was excellent. Shortly after that trip, Johnson was hired by Rosen to serve as plaintiff's supervisor. Johnson testified that when he was hired, Rosen "made it very clear that he did not like Ed Wiedemeier. He made it very clear to me that he did not want Ed onboard. I'm not saying that I did not make the decision. But it was very clear, and that pressure was everyday. It was everyday, e-mails with large capital letters, just shouting and screaming at you. . . . It was very clear that he did not like Ed, that he felt

that Ed was not doing what he was supposed to do from day one.” Johnson testified: “During my interview process I was asked such a random question. How would you fire somebody who might be hitting their numbers? That’s a weird question for somebody to ask you in an interview.” Johnson testified that he felt pressured by Michael Rosen and another employee, Andy Jedynak, to fire plaintiff. Johnson testified that he told Rosen that the goals for his sales team were impossible to reach and that “[i]t was completely irrational.” Johnson testified that between the time he was hired and plaintiff’s termination, he did not know whether he had enough information about plaintiff to warrant firing him.

Before and during the Florida trip, plaintiff was praised and rewarded as a top employee. Shortly after the Florida event, Johnson was hired and became plaintiff’s supervisor. Johnson declared that he was pressured by Rosen (who had attended the Florida event) from the outset to terminate plaintiff. Johnson’s testimony, if credited, suggests that he fired plaintiff because he was pressured to do so by Rosen. And if credited, and absent evidence that Rosen harbored discriminatory animus—a showing not made by plaintiff here—there would be no evidence that plaintiff was terminated because of sexual orientation discrimination. But a trier of fact would not be compelled to credit Johnson’s testimony or to conclude that he fired plaintiff because of pressure from Rosen to do so, in light of the evidence of Johnson’s animus toward gays. A trier of fact might reasonably conclude that Johnson might, or might not, have fired plaintiff because of his sexual orientation. Plaintiff raised a triable issue of material fact as to causation. (*Colarossi v. Coty US Inc.*, *supra*, 97 Cal.App.4th at p. 1154 [timing of decision to fire may have been coincidental, but in light of other evidence, it added to the impression that the employer possessed a retaliatory motive].)

#### ***D. Failure to Warn Plaintiff***

Johnson testified in his deposition that he never talked with plaintiff about his concerns after the meeting with persons at Lower My Bills which led to his decision to terminate plaintiff. He never gave plaintiff any official warning that he would have to do something to avoid termination. He never told plaintiff that he would be terminated if he

did not bring in brand advertisers. Johnson did not tell plaintiff that if he did not “start executing timely on his reports” he would be terminated. Although he had heard that plaintiff was difficult to work with, Johnson never sat down with him to discuss this. He never told plaintiff that if he did not set up meetings, he would be terminated. Johnson never told plaintiff he would have three or six months, or any other time, to change his performance, what was expected, or that he would be terminated unless he improved.

Plaintiff declared that Rosen never asked him for an explanation about the e-mails which Rosen cites in his declaration as a reason for his dissatisfaction with plaintiff. Rosen never discussed them with plaintiff. Plaintiff said that he never received any verbal or written warning that termination was a possibility. He never was warned about his performance, never had any formal meetings about his performance with any employee of defendant, and was never placed on any form of probation. He was very surprised at his termination because of his history of being a top performer for defendant.

Plaintiff argues defendant’s failure to warn plaintiff of performance problems was contrary to its policy manual, exhibit 10 to plaintiff’s opposition. Section 3.1 of the manual states: “An employee whose performance is considered unsatisfactory will be counseled, informed of areas needing improvement, and told of the actions and time frame in which the shortcomings will be overcome.” Section 3.0 of the manual requires that all disciplinary actions be formally documented and required the employee’s signature. If an oral warning does not correct the problem, section 5.2 of the manual states that the manager “should” meet formally with the employee to inform him or her of the unsatisfactory performance, what improvements are expected, the timing for improvement, and the consequences if performance does not improve. Under this section of the manual, the manager is to prepare a memorandum setting out the specifics of the meeting, which is to be signed by the employee.

Defendant argues that plaintiff was warned, citing Rosen’s directive that he should not rely on a single client and should be having more client interactions. Defendant also cites Johnson’s declaration stating that he talked with plaintiff about his dissatisfaction regarding his performance in the meeting with Lower My Bills. Defendant contends that

the progressive discipline set out in the manual was not required, and that the manual warned that employees served at will.

Plaintiff's evidence established that before he took a male friend on the Florida trip, he had been a highly rewarded and valued employee. Shortly after that trip, Rosen hired Johnson and began to pressure Johnson every day to terminate plaintiff. Although defendant presented evidence of unsatisfactory performance by plaintiff, plaintiff was not warned or counseled about these issues. In *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1062, the Supreme Court found evidence of problems with plaintiff's performance not sufficient to support summary judgment for the employer where the plaintiff presented evidence that she consistently received high evaluations and an award the year before she was fired. In addition, a manager actively solicited negative information about the plaintiff, which the court found "strongly suggests the possibility that [plaintiff's] employer was engaged in a search for a pretextual basis for discipline, which in turn suggests that the subsequent discipline imposed was for purposes of retaliation." (*Ibid.*)

*Kelly, supra*, 135 Cal.App.4th 1088 is also germane. An internet company in financial difficulty hired a new chief executive officer who brought in a turn-around specialist. Upper management was dissatisfied with the marketing group in the small business unit, for which the plaintiff performed direct marketing services. When consolidation of units, including plaintiff's, was planned, the turn-around specialist was asked to list employees to be retained. The CEO had told the chief financial officer that the plaintiff, who was pregnant, had poor attendance and used the term "'checked out'" to refer to her poor attendance and attitude. (*Id.* at p. 1093.) Plaintiff was terminated with others not retained in the restructuring. The employer took the position that plaintiff's position had been eliminated.

Kelly sued for employment discrimination based on pregnancy. In opposition to summary adjudication, she presented evidence of very high performance evaluations. Her former manager said he had included her in the list for retention in the restructuring because her knowledge and skills made her the "only person capable of managing" the

reduced group. (*Kelly, supra*, 135 Cal.App.4th at p. 1094.) In a conversation with the manager about this recommendation, the CEO repeated his comments that plaintiff had mentally “checked out” and questioned whether she was really doing her job. (*Id.* at p. 1093.) The manager responded that this criticism was untrue and defended plaintiff’s commitment, hard work and singular ability to assume the manager role. (*Ibid.*) Another member of the senior management team also strongly recommended plaintiff’s retention, saying that she was extremely competent and a tremendous asset to the defendant. (*Id.* at p. 1095.) In response, the CEO repeated his comment that plaintiff had “checked out.” (*Ibid.*) There was evidence that the turn-around specialist took over plaintiff’s position, despite the defendant’s claim that the position had been eliminated. (*Ibid.*) Plaintiff met with the CEO to discuss why she had been terminated. The CEO lied and said that she had not been on her former manager’s retention list. (*Id.* at p. 1096.) He said her position had been eliminated.

The Court of Appeal in *Kelly* concluded that the evidence submitted by plaintiff raised triable issues of material fact precluding summary adjudication. (*Kelly, supra*, 135 Cal.App.4th at p. 1101.) There was sufficient evidence that the reasons proffered by the defendant were pretextual. Plaintiff had a record of excellence attested to by two high executives and both of these executives strongly recommended plaintiff’s retention. The court also relied on the statements made by the CEO that plaintiff had “checked out:” “[T]his reaction and terminology are not, as the trial court suggested, unamenable to signifying a discriminatory animus. Indeed, in at least one instance when he used the phrase concerning plaintiff, [the CEO] also referred in some fashion to her pregnancy. Moreover, even if the language be deemed nondiscriminatory in isolation, there is no doubt that [the CEO’s] manifest attitude toward plaintiff’s retention was bluntly negative, in vivid contrast to the views and assessments of those executives who worked with her.” (*Id.* at p. 1099.)

The *Kelly* court concluded that the evidence that defendant’s reasons were pretextual also supported an inference that the actual reason for her termination was discrimination based on plaintiff’s pregnancy. It found direct evidence of discriminatory

intent in the CEO's statements that plaintiff had "'checked out.'" (*Kelly, supra*, 135 Cal.App.4th at p. 1101.) The court reasoned: "Under the circumstances, that plaintiff was about seven months pregnant and was expected to take her allotted three months' pregnancy leave, [the CEO's] 'checked out' comments could reasonably be understood as referring to some combination of plaintiff's commitment to take the leave, and a temporary diversion of her attention attendant to her condition. In other words, [the CEO] could be seen as saying that plaintiff's pregnancy and upcoming leave disqualified her for retention. And of course [a senior manager] testified that [the CEO] directly connected his 'checked out' remarks to plaintiff's pregnancy." (*Ibid.*) The court rejected the defendant's arguments that the CEO's remarks were too vague or neutral to raise an inference of discriminatory animus or that they were merely "stray" remarks. (*Ibid.*)

Our case is similar to *Kelly, supra*, 135 Cal.App.4th 1088. Here, plaintiff submitted evidence of his excellent performance which was rewarded with raises and accolades within four months of his termination. In addition, he presented evidence of two statements by Johnson which may reasonably be understood to express hostility and animus toward gays. Finally, Johnson's explanation for plaintiff's termination was that there are "better types" to sell the accounts defendant sought. This last comment was akin to the statements that the plaintiff in *Kelly* had "checked out." While neutral on its face, in context with the other comments made by Johnson, and in light of evidence of plaintiff's outstanding performance, a triable issue of material fact was raised that plaintiff was terminated because of discriminatory animus based on sexual orientation.

As we have discussed, the fact that Rosen was unaware that plaintiff was gay does not controvert this showing for purposes of summary judgment. The element of causation under FEHA may be satisfied "by showing that *any* of the persons involved in bringing about the adverse action held the requisite animus, provided that such person's animus operated as a 'but-for' cause, i.e., a force without which the adverse action would not have happened. Certainly a defendant does not conclusively negate the element of causation by showing only that some responsible actors, but not all, were ignorant of the occasion for retaliation." (*Reeves, supra*, 121 Cal.App.4th at p. 108, italics added.) The

analysis by the *Reeves* court is equally applicable here. While the evidence was not sufficient to raise a triable issue of material fact that Rosen acted with discriminatory animus, there was sufficient evidence to raise a triable issue of material fact as to Johnson's animus.

The evidence presented by plaintiff, taken as a whole, was sufficient to raise triable issues of material fact that would permit a trier of fact to find by a preponderance that intentional discrimination occurred. (*Aguilar, supra*, 25 Cal.4th at pp. 850-851; *Guz, supra*, 24 Cal.4th at p. 357.) In light of this conclusion, we need not discuss the other evidence proffered by plaintiff. The trial court erred in granting defendant a judgment based on summary adjudication on the causes of action for discrimination and wrongful termination against public policy.

#### **DISPOSITION**

The judgment is reversed. Plaintiff is to have his costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.**

EPSTEIN, P.J.

We concur:

WILLHITE, J.

MANELLA, J.